UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW

Intervenor

v.

AZTAR INDIANA GAMING COMPANY, LLC d/b/a CASINO AZTAR

Respondent

ON APPLICATION FOR ENFORCEMENT
OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 08-2037 NATIONAL LABOR RELATIONS BOARD **Petitioner** and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT **WORKERS OF AMERICA, UAW** Intervenor \mathbf{v}_{\bullet} AZTAR INDIANA GAMING COMPANY, LLC d/b/a CASINO AZTAR Respondent ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD **BRIEF FOR**

THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the application of the National Labor Relations Board ("the Board") to enforce a Board Order issued against Aztar Indiana Gaming Company, LLC d/b/a Casino Aztar ("the Company"). The Board's Decision and Order issued on March 19, 2008, and is reported at 352 NLRB No. 41. (SA 28-30.)¹ In its decision, the Board found that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 158(a)(5) and (1)) ("the Act"), by failing and refusing to bargain with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW ("the Union"). The Union intervened on behalf of the Board's application for enforcement.

The Board had subject matter jurisdiction under Section 10(a) of the Act (29 U.S.C. § 160(a)). The Board's Order is final with respect to all parties under Section 10(e) of the Act (29 U.S.C. § 160(e)). This Court has jurisdiction under Section 10(e) (29 U.S.C. § 160(e)) of the Act, because the unfair labor practices occurred in Evansville, Indiana.

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¹ Record references are to documents in the volume of pleadings ("PL") filed by the Board; the transcript ("Tr."), Company exhibits ("ERX"), and Union exhibits ("UX") filed by the Board, originating from the September 2007 representation-case hearing; and the short appendix ("SA") filed by the Company. References

The Board filed its application for enforcement on April 28, 2008. This filing was timely, as the Act places no time limit on the institution of proceedings to enforce Board orders.

As the Board's unfair labor practice order is based, in part, on findings made in the underlying representation proceeding (Board Case No. 25-RC-10403), the record in that proceeding is also before this Court pursuant to Section 9(d) of the Act (29 U.S.C. § 159(d)). See Boire v. Greyhound Corp., 376 U.S. 473, 476-79 (1964). Section 9(d) authorizes judicial review of the Board's actions in a representation proceeding for the limited purpose of deciding whether to "enforc[e], modify[], or set[] aside in whole or in part the [unfair labor practice] order of the Board" (29 U.S.C. § 159(d)), but does not give the Court general authority over the representation proceeding. The Board retains authority under Section 9(c) of the Act (29 U.S.C. § 159(c)) to resume processing the representation case in a manner consistent with the ruling of the Court in the unfair labor practice case. See, e.g., Freund Baking Co., 330 NLRB 17, 17 & n.3 (1999); Medina County Publications, 274 NLRB 873, 873 (1985).

preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." references are to the Company's opening brief.

STATEMENT OF THE ISSUES PRESENTED

The ultimate issue is whether the Board properly found that the Company violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union as the duly certified representative of a unit of its employees. That issue, however, turns on the subsidiary issue of whether substantial evidence supports the Board's finding that the Company's dual rate dealers/floor supervisors and full-time floor supervisors are not "supervisors" under Section 2(11) of the Act and therefore are properly included in the bargaining unit.

STATEMENT OF THE CASE

This case involves the Company's failure and refusal to bargain with the Union after the Company's employees, including the dual rate dealers/floor supervisors and full-time floor supervisors, voted in favor of union representation in a Board-conducted election. The Board found that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (SA 29.)

The Company admits (Br. 3) that it has refused to bargain with the Union, but claims that its refusal is lawful because the Board, in the representation proceeding, improperly included dual rate dealers/floor supervisors and full-time floor supervisors in the bargaining unit. (PL Complaint Exhibit B, PL Answer to Complaint ¶ 5-6, PL Respondent's Memorandum and Motion in Response to

General Counsel's Motions to Strike and for Summary Judgment 1-2, SA 28.) The Board's findings in the representation and unfair labor practice proceedings, as well as its Decision and Order under review, are summarized below.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Company's Casino

1. Background

The Company operates a riverboat casino and related land-based businesses in Evansville, Indiana. (SA 3; Tr. 53.) In its casino, the Company offers a number of table games to patrons, and it is the status of certain employees involved in the running of those games — specifically, the "dual rate dealers/floor supervisors" and "[full-time] floor supervisors" — that is in question here. (SA 2-3; Tr. 54, ERX 2, 3.)

The casino operates on three floors of the riverboat and has table games on each of those floors, in dedicated table-games areas. (SA 3; Tr. 225-27.) There are four table-games areas called "pits" ("Pit A," "Pit B," "Pit B-," and "Pit C"), plus a specialized area for high-stakes table games ("the salon") and a specialized area for

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² The term "floor supervisor" will hereafter be used to refer to both the "dual rate dealers/floor supervisors" and "[full-time] floor supervisors," as the arguments are identical as to these two groups.

poker ("the poker room"). (SA 3; Tr. 175, 225-27, 244-48, UX 26.) The salon and each of the pits hold six gaming tables. (SA 3; Tr. 176, 680-81, UX 26.) The poker room holds 10 to 12 gaming tables. (SA 3; Tr. 769, UX 26.)

The Company's operations in the casino are under strict government regulation. (SA 3; Tr. 416.) At the state level, the casino is under the jurisdiction of the Indiana Gaming Commission ("IGC") and must comply with its detailed rules covering all gaming activity in the casino. (SA 3; Tr. 416-19, UX 1.) To comply with these rules, the Company has developed "internal control manuals" for each of the table games. (SA 3; Tr. 148, 419, ERX 40, UX 18-25.) These manuals, and any modifications to them, must be approved by the IGC. (SA 3; Tr. 418, 435-37.)

The internal control manuals provide, among other things, detailed instructions as to how each table game is to be run by casino personnel. (SA 3; Tr. 155-56, UX 18-25.) The instructions encompass even the minutest of details, such as: the handling of playing cards when they are not in use; the manner in which cards and chips are to be delivered to and from a table; the dealer's physical posture in dealing cards at the table; the proper position of the cards in the dealer's hand; and the specific way in which the dealer is to shuffle and distribute cards at the table. (SA 3; Tr. 155-56, 238-41, 663-65, UX 18-25.) Copies of the internal control manuals are maintained in a variety of locations throughout the casino, to

ensure that compliance may be verified and any noncompliance corrected as the games are running. (SA 3; Tr. 95, 156, 164, 197-98, 240, 477, 703.)

2. The Company's organizational structure

The Company employs numerous supervisors, that it admits are "supervisors" under Section 2(11) of the Act, to oversee its table games department. (SA 4; Tr. 54-56.) The Director of Table Games stands at the top of the table-games hierarchy, followed by the Table Games Administrator, the Table Games Scheduler/Trainer, approximately 3 shift managers, approximately 3 assistant shift managers, approximately 6 pit managers, and approximately 5 dual rate floor supervisors/pit managers. (SA 4; Tr. 54-56, ERX 47.) All of these supervisory positions are salaried. (SA 4; UX 3.)

Below these various admitted Section 2(11) supervisors are 45 floor supervisors and 138 dealers. (SA 4; Tr. 57.) The floor supervisors and dealers are paid on an hourly basis, but their hourly rates differ. (SA 5; Tr. 45-47, 277, 575-76, 659, UX 3.) While the hourly rate for floor supervisors is higher than that for dealers, the dealers have the opportunity to earn tips, while the floor supervisors do not. (SA 5; Tr. 123, 256, 575-76.) The result is that a dealer's take-home wage may be roughly equivalent to a floor supervisor's take-home wage. (SA 5; Tr. 266, 368.)

3. The floor supervisors' duties and responsibilities

The floor supervisors' main role is to monitor the dealers' running of the various table games. (SA 9-10, 12; Tr. 95, 197-98.) When a dealer makes an error or deviates from protocol, the floor supervisor corrects the situation and reminds the dealer of the proper procedures as set forth in the internal control manuals. (SA 10-11; Tr. 96-97, 113, 164, 281, 379, 480, 589-90.) Floor supervisors only have authority to correct minor monetary pay-out errors by the dealers. (SA 11; Tr. 193-95, 261-62.)

The floor supervisors attend training sessions to learn about their specific duties in the casino. (SA 7; Tr. 101-06, 109, ERX 4, 5.) These training sessions address various aspects of the floor supervisors' role in monitoring the table games and ensuring compliance with state and federal gaming laws. (SA 7; Tr. 101-06, 109, ERX 4, 5.)

Floor supervisors, like all company employees, complete Table Games Incident Reports ("incident reports") to report errors or improper conduct by another employee, or inappropriate behavior by a customer. (SA 11-12; Tr. 76-78, 267-68, 282.) Incident reports provide a space for a "recommendation," but the recommendation section is not routinely completed. (SA 12; Tr. 78, 373, 750,

ERX 12-22.) At least one floor supervisor was instructed not to complete that portion of the form. (SA 12; Tr. 639.)

Completed incident reports, whether completed by floor supervisors or other employees, are given to the shift manager. (SA 12; Tr. 78-79, 294.) If a report contains information that might warrant re-training or discipline of an employee, the shift manager, Table Games Administrator, and the Director of Table Games undertake an investigation. (SA 12; Tr. 78-79, 317, 377-78, 547.) The investigation can include collecting incident reports from other witnesses and reviewing surveillance video. (SA 12; Tr. 78, 546-47.) Following the investigation, the Table Games Administrator determines whether re-training or discipline is called for. (SA 12; Tr. 546.) Discipline has never been issued in the absence of a full independent investigation. (SA 21; Tr. 377-78, 545-47.)

The Table Games Scheduler/Trainer schedules employees' days and hours of work. (SA 8; Tr. 94, 366.) The schedule is posted at least a week in advance. (SA 8; Tr. 142.) If adjustments to the schedule are necessary, they are made by the pit or shift managers. (SA 8; Tr. 126, 210-15, 252-54, 366, 705.)

Four floor supervisors are regularly assigned to the poker room. (SA 8; Tr. 553, 564-67.) Other floor supervisors are assigned to the poker room only as necessary to cover every shift. (SA 8; Tr. 553, 567.) The floor supervisors in the poker room establish a rotation of tables for the poker room dealers to work

through. (SA 8-9; Tr. 767, 774-77.) The floor supervisors establish the rotation based on customer demand. (SA 8; Tr. 765, 775.) The dealers work through the rotation of tables by a pre-established timing pattern. (SA 8-9; Tr. 767.)

Floor supervisors are required to wear business attire when working on the casino floor. (SA 5; Tr. 138, 254-55.) Dealers wear a uniform of black pants, black shoes, and a uniform shirt or blouse. (*Id.*)

B. The Representation Proceeding

On August 21, 2007, the Union filed a petition with the Board, seeking to represent a bargaining unit consisting of the Company's dealers and floor supervisors. (PL Motion to Strike Portions of Respondent's Answer, Motion to Transfer Proceeding to Board, and Motion for Summary Judgment ¶ 1 and Exhibit 1(a).) The Company responded to the petition, maintaining that the proposed unit was not appropriate because the floor supervisors are supervisors under Section 2(11) of the Act (29 U.S.C. § 152(11)). (SA 2.)

After a hearing, the Regional Director for Region 25 issued a Decision and Direction of Election on October 4, 2007, finding that the floor supervisors are not statutory supervisors and ordering an election. (SA 1-26.) On October 18, 2007, the Company filed a Request for Review of the Regional Director's Decision and Direction of Election. (PL Request for Review of Regional Director's Decision

and Direction of Election 1-48.) On November 14, 2007, the Board (Members Liebman, Schaumber, and Kirsanow) denied the Request for Review. (SA 27.)

On October 27, 2007, the Board conducted a representation election among employees in the proposed bargaining unit. (PL Notice of Election.) The results showed that of 177 eligible voters, 165 voted, with 106 ballots cast for the Union. (PL Tally of Ballots.) On November 28, 2007, the Board certified the Union as the exclusive bargaining representative of the dealers and floor supervisors in the Company's casino. (PL Certification of Representative.)

C. The Unfair Labor Practice Proceeding

After the certification issued, the Company refused to bargain with the Union. (PL Complaint Exhibit B.) The Union filed an unfair labor practice charge and the Board's General Counsel issued a complaint alleging that the Company's refusal to bargain with the Union violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (PL Charge Against Employer, PL Complaint ¶ 6.) In its answer to the complaint, the Company admitted its refusal to bargain, but attacked the validity of the Union's certification as the floor supervisors' bargaining representative. (PL Answer to Complaint ¶ 5-6.)

On January 23, 2008, the General Counsel filed a motion for summary judgment. (PL Motion to Strike Portions of Respondent's Answer, Motion to Transfer Proceeding to Board, and Motion for Summary Judgment.) The Board

issued a notice to show cause and the Company filed a response, again contending that the certification was invalid because the floor supervisors are supervisors under the Act. (SA 28; PL Order Transferring Proceeding to the Board and Notice to Show Cause.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Members Liebman and Schaumber) found that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to bargain with the Union. (SA 28-30.) The Board found that all of the issues raised by the Company in the unfair labor practice proceeding were, or could have been, litigated in the underlying representation proceeding and that the Company neither "offer[ed] to adduce at a hearing any newly discovered and previously unavailable evidence" nor alleged the existence of any special circumstances that would require reexamination of the Board's decision in the representation case. (SA 28.)

The Board's Order requires the Company to cease and desist from the unfair labor practice found, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights. (SA 29.) Affirmatively, the Board's Order requires the Company, upon request, to recognize and bargain with the Union, to embody any understanding the parties might reach in a signed agreement, and to post a remedial notice. (SA 29-30.)

SUMMARY OF ARGUMENT

The Company has failed to meet its burden of proving that its floor supervisors are "supervisors" within the meaning of Section 2(11) of the Act.

Therefore, the floor supervisors were properly included in the certified bargaining unit and the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union.

First, the record fails to support the Company's claim that the floor supervisors effectively recommend discipline or initiate the disciplinary process. Rather, the evidence shows that the floor supervisors, like all other employees, complete incident reports that do nothing more than create the possibility of discipline. Moreover, the floor supervisors exercise no independent judgment in determining whether to complete an incident report.

Second, the record also fails to support the Company's claim that the floor supervisors have authority to assign and responsibly direct dealers. The dealers' assignments are handled by the Table Games Scheduler/Trainer, not the floor supervisors. And any direction that the floor supervisors give the dealers is based on detailed internal control manuals prepared by the Company to ensure compliance with state gaming regulations. Therefore, the floor supervisors do not exercise independent judgment, but provide formulaic instructions to dealers.

None of the Company's other arguments – such as its reliance on state gaming regulations or its policy concerns about divided loyalty – requires a different result. The Board's Order is accordingly entitled to enforcement.

ARGUMENT

THE BOARD PROPERLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION AS THE CERTIFIED REPRESENTATIVE OF A BARGAINING UNIT INCLUDING THE COMPANY'S FLOOR SUPERVISORS

A. Introduction

The Act prohibits an employer from refusing to bargain collectively with the representative of its employees. 29 U.S.C. § 158(a)(5).³ Here, the Company has admittedly refused to bargain with the Union in order to obtain judicial review of the bargaining unit certified by the Board. (Br. 3.) According to the Company, the bargaining unit improperly includes floor supervisors who, in its view, are "supervisors" under the Act and therefore excluded from the Act's protections. The Company maintains that the inclusion of these workers in the bargaining unit

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³ Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of [its] employees." An employer's failure to meet its Section 8(a)(5) bargaining obligation constitutes a derivative violation of Section 8(a)(1) (29 U.S.C. § 158(a)(1)), which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the[ir] [statutory] rights." *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

renders the unit invalid and relieves the Company of any obligation to bargain with the Union.

The narrow question presented to this Court, given the Company's position, is whether substantial evidence supports the Board's finding that the Company failed to establish that the floor supervisors are supervisors under the Act. For the reasons set forth below, this question must be answered in the affirmative.

Accordingly, the Company had an obligation to bargain with the Union as the representative of a bargaining unit encompassing those disputed workers, and its refusal to so bargain constitutes a violation of Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5)).

- B. Substantial Evidence Supports the Board's Finding that the Company's Floor Supervisors are Not "Supervisors" Within the Meaning of the Act
 - 1. Applicable principles and standard of review: statutory supervisors are excluded from the Act's protections; the Board's finding of supervisory status or lack thereof is subject to limited judicial review

Section 2(3) of the Act (29 U.S.C. § 152(3)) states that the term "employee," as used in the Act, "shall not include . . . any individual employed as a supervisor" Supervisors are thus without the various rights and protections guaranteed to "employees" under the Act — for example, the right to bargain collectively (29 U.S.C. § 157), and the corresponding protection against an employer's refusal to

bargain (29 U.S.C. § 158(a)(5)). *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1464 (7th Cir. 1983) (finding supervisors "exclude[d] from the definition of 'employee,' and hence from the Act's protection").

Because the consequence of supervisory status is exclusion from the Act's protections, the Act specifies, at some length, the attributes of those individuals who are "supervisors." Under Section 2(11) of the Act (29 U.S.C. § 152(11)), a "supervisor" is:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In accordance with this definition, the Board and the Courts consider individuals to be statutory supervisors "if (1) they have the authority to engage in any 1 of the 12 listed supervisory functions, (2) their 'exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,' and (3) their authority is held 'in the interest of the employer.'" *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 712-13 (2001) (citation omitted). *Accord NLRB v. GranCare, Inc.*, 170 F.3d 662, 665 (7th Cir. 1999); *Oakwood Healthcare, Inc.*, 348 NLRB No. 37, slip op. at 2 (2006).

Despite Section 2(11)'s rather detailed definition of "supervisor," "the exact boundaries of the definition are not precise." *American Diversified Foods, Inc. v. NLRB*, 640 F.2d 893, 894 (7th Cir. 1981). This Court has recognized that it is for the Board, in its substantial and informed discretion, to address the boundaries of the definition, filling in the statutory "gaps" where necessary. *Id. See NLRB v. Adam & Eve Cosmetics, Inc.*, 567 F.2d 723, 726 (7th Cir. 1977) (referring to the Board's "informed discretion" to determine who is a supervisor under the Act (citation omitted)). *See also Kentucky River Community Care*, 532 U.S. at 713 (recognizing that it falls "clearly within the Board's discretion" to determine, for example, what scope of individual discretion qualifies as "independent judgment" for purposes of Section 2(11)).

In *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006), and its two companion cases, *Croft Metals, Inc.*, 348 NLRB No. 38 (2006), and *Golden Crest Healthcare Center*, 348 NLRB No. 39 (2006), the Board exercised its acknowledged discretion to clarify the term "independent judgment," as used in Section 2(11).⁴ "[A]s a starting point," the Board stated, for "independent judgment" to exist "an individual must at minimum act, or effectively recommend

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⁴ In these cases, the Board also took the opportunity to clarify the meaning of the statutory terms "assign" and "responsibly to direct," as discussed below (pp. 34, 36). *Id.* at slip op. 4-7.

action, free of the control of others and form an opinion or evaluation by discerning and comparing data." *Oakwood*, slip op. at 8. Further, in taking or effectively recommending one of the actions set forth in Section 2(11), the individual must exercise a degree of discretion that "rises above the 'routine or clerical." *Id.* (citations omitted). The Board specifically noted that "a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." *Id.*

The Board's interpretation of the term "independent judgment" follows, in part, from the general legislative purpose behind Section 2(11), to distinguish between truly supervisory personnel, who are vested with "genuine management prerogatives," and employees — such as "straw bosses, leadmen, and set-up men" — who enjoy the Act's protections even though they perform "minor supervisory duties." *Id.*, slip op. at 3 (citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81 (1974) (quoting Sen. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947))). *See also NLRB v. Joy Recovery Technology Corp.*, 134 F.3d 1307, 1313 (7th Cir. 1998) (observing that in Section 2(11), "Congress sought to distinguish between [those who exercise] 'genuine management prerogatives' and employees . . . who enjoy the Act's protections even though they perform 'minor supervisory duties'" (citation omitted)). Reading Section 2(11) in light of this legislative

purpose, it is clear that "[s]upervision in the elementary sense of directing another's work is excluded [from the reach of Section 2(11)]; a supervisor under the statute must have authority over another's job tenure and other conditions of employment." *Res-Care, Inc.*, 705 F.2d at 1465.

In giving effect to the purposes behind Section 2(11), "the [B]oard has a duty to employees to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights which the [A]ct is intended to protect." *GranCare, Inc.*, 170 F.3d at 666 (citation omitted). The Board's duty in this regard accords with the more general duty of both "administrators and reviewing courts" to tread carefully where exemptions from the Act are concerned, because an overly broad construction of these exemptions results in denial of protection "to workers that the Act was designed to reach." *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996).

The ultimate burden of proving an individual's supervisory status rests with the party asserting such status. *Kentucky River*, 532 U.S. at 711; *Joy Recovery Technology Corp.*, 134 F.3d at 1313. Accordingly, in this case, the Company had the burden of proving that the floor supervisors are supervisors under the Act.

This Court applies a deferential standard of review to the Board's supervisory-status findings. *GranCare, Inc.*, 170 F.3d at 666. "As the issue is primarily one of fact, the Board's determination regarding the supervisory status of

an employee will not be overturned as long as substantial evidence exists to support the Board's finding." *Adam & Eve Cosmetics*, 567 F.2d at 726-27. *Accord Joy Recovery Technology Corp.*, 134 F.3d at 1313. Substantial evidence consists of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). Generally, a reviewing court may not displace the Board's choice between two fairly conflicting views of the evidence, even if the court "would justifiably have made a different choice had the matter been before it de novo." *Universal Camera*, 340 U.S. at 488. *See also Joy Recovery Technology Corp.*, 134 F.3d at 1312 ("We affirm the Board's findings if they are supported by substantial evidence, even if we might have made a different finding.").

2. The floor supervisors do not perform most of the supervisory functions enumerated in Section 2(11)

At the outset, "it is important to note what [the employees at issue] do *not* do." *NLRB v. Hilliard Development Corp.*, 187 F.3d 133, 147 (1st Cir. 1999) (quoting *Telemundo de Puerto Rico, Inc. v. NLRB*, 113 F.3d 270, 272 (1st Cir. 1997)). The Company does not claim that the floor supervisors hire, transfer, suspend, lay off, recall, promote, discharge, or reward other employees, or that they adjust employee grievances, within the meaning of Section 2(11). Nor does the Company claim that the floor supervisors "effectively recommend" the hire,

layoff, recall, or reward of other employees, or that they effectively recommend the adjustment of employee grievances, within the meaning of Section 2(11).

Similarly, it is virtually undisputed that the floor supervisors do not have authority to transfer or promote employees, or to effectively recommend such action. To be sure, in a single paragraph at the end of its brief, the Company maintains that its floor supervisors can prepare documents praising dealer performance — called "positive records of discussion" (Tr. 207) — and that these documents "are used as recommendations for the purpose of transfers and promotions." (Br. 37.) However, the Company does not elaborate on this statement or provide any explanation as to how a positive record of discussion can influence a decision regarding a dealer's transfer or promotion. Rather, the Company simply offers a citation to one page of the hearing transcript, on which page Director of Human Resources Crowe states: "All that [positive feedback] goes into the system, you know, and is used when [the dealers] apply for transfers and promotions and those kind of things." (Tr. 59.)

Crowe's bare statement, unsupported by evidence of any specific instance in which a floor supervisor's positive record of discussion has influenced a dealer's transfer or promotion, is clearly insufficient to prove that the floor supervisors make effective recommendations of transfer and promotion. *See Oil, Chemical and Atomic Workers Int'l Union, AFL-CIO v. NLRB*, 445 F.2d 237, 243 (D.C. Cir.

1971) ("what the statute requires is evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority"). *See also Res-Care, Inc.*, 705 F.2d at 1467 (upholding Board's finding that licensed practical nurses had no supervisory authority where evidence of their supervisory authority was "limited very largely to the [nursing home] administrator's general assertions" at hearing). Accordingly, the Company's passing suggestion of such authority to influence transfers and promotions does not bear serious consideration.

This leaves just a few disputed areas of Section 2(11) supervisory authority. More specifically, the Company argues that its floor supervisors have the authority to "effectively recommend" discipline for dealers in the Company's casino and that, on this basis alone, the floor supervisors must be considered statutory supervisors. The Company adds, nonetheless, that the floor supervisors also "assign" and "responsibly [] direct" the Company's dealers, within the meaning of Section 2(11). As discussed below, the Company has failed to make out any of these proffered bases for a finding of supervisory status.

3. The Company failed to establish that the floor supervisors effectively recommend or initiate discipline

The Company argues that the floor supervisors make "effective recommendations" of discipline and, therefore, are supervisors under the Act. (Br. 16-22, 35-36.) Although the evidence shows that the floor supervisors

occasionally complete incident reports, the Company's argument fails because the record does not show that these reports constitute discipline or that discipline necessarily follows from them. Moreover, the floor supervisors do not exercise "independent judgment" in preparing these incident reports, sufficient to bring them within the coverage of Section 2(11). Likewise, there is no merit in the Company's related argument that a finding of supervisory status is warranted because the floor supervisors' incident reports "lay the foundation" for or initiate discipline (Br. 20-21, 36) and therefore are themselves "a form of discipline" under Board law (Br. 35-36).

a. The floor supervisors do not effectively recommend discipline in the incident reports

Contrary to the Company's claims (Br. 16-22, 35-36), the floor supervisors' authority to complete incident reports does not constitute effective recommendation. Rather, the reports are factual in nature and, to the extent that they contain disciplinary recommendations, there is no evidence that such recommendations have ever been followed.

As the Board found (SA 20), occasionally the floor supervisors complete incident reports to detail and report a situation regarding a dealer's conduct. (SA 11-12; Tr. 76-78, 267-68, 282.) However, the undisputed evidence also shows that *all* employees can, and do, complete identical incident reports regarding the

conduct of any other employee. (*Id.*) In these circumstances, it is not surprising that the Board found that if "completing incident reports confers supervisory status . . . [then] all of [the Company's] employees [would be] excluded from the unit as supervisors" and that such would be "an impractical result." (SA 21.) *See GranCare, Inc.*, 170 F.3d at 666 (observing that "the [B]oard has a duty to employees to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights which the [A]ct is intended to protect").

Putting aside this obvious weakness in the Company's argument, the Company's contention still fails because the record does not show that the incident reports effectively recommend discipline. Although the incident report forms provide space for a "recommendation," less than half of the completed incident reports in the record have that space filled in. (ERX 12-22.) Moreover, floor supervisor Salli Rackley testified that she was explicitly told *not* to fill in the recommendation section of the incident report form, as that area was "not for [her] to fill out." (Tr. 639.)

Even assuming that the floor supervisors were authorized and expected to make recommendations of discipline in the incident reports, the Company has not carried its burden of proving that the floor supervisors' recommendations were "effective." Indeed, the Company cites no evidence that any of the floor

supervisors' purported recommendations have ever figured in the process of determining whether and how to discipline a dealer.⁵

More specifically, only four of the incident reports in the record call for action that could be considered discipline. One calls for "retrain[ing] and write-up" (ERX 12); one calls for "write-up" only (ERX 18(A)); one calls for removal of a dealer from the poker room (ERX 15(A)); and one calls for suspension of a dealer (ERX 20)). However, Table Games Administrator Turner testified that none of those recommendations was followed. (Tr. 302, 311, 314-315, ERX 12, 15(A), 18(A), 20.)⁶

Moreover, as the Board explained (SA 21), "recommendations were never effectuated without a separate investigation being completed by management."

Thus, as detailed above (p. 9), the evidence shows that completed incident reports (whether prepared by a floor supervisor or any other employee) are given to the shift manager, who determines if the report contains information that might warrant re-training or discipline of an employee. If the shift manager determines

⁵ Three of the incident reports in the record that contain a recommendation call for some form of "retraining." (ERX 17(B), ERX 17(A), ERX 22.) Although Table Games Administrator Turner testified that the retraining recommendations were followed, she also stated that retraining was not a form of discipline. (Tr. 307-08, 319, ERX 17(A), 17(B), 22).

that such action might be warranted, then the shift manager, the Table Games Administrator, and the Director of Table Games perform a thorough investigation. After the investigation is completed, the Table Games Administrator determines whether re-training or discipline is called for. The Company presented no evidence that the recommendation in the incident report, when there is one, is considered by the Director of Table Games, or any of the managers conducting the investigation, in determining whether to issue discipline. In these circumstances, the Board reasonably found (SA 21) that the "floor supervisors are not effectively recommending discipline." See NLRB v. Hilliard Development Corp., 187 F.3d 133, 147 (1st Cir. 1999) (upholding Board's finding of no authority to "effectively recommend" discipline where putative supervisors reported employee misconduct on incident forms, occasionally including a recommendation, but actual disciplinary decisions were made by others).

Rather, at most, the floor supervisor's incident report creates the *possibility* of discipline. Under established case law, an individual cannot be deemed a statutory supervisor merely because he makes a factual report that creates the possibility of discipline. *See Id.*, 187 F.3d at 147 (finding that charge nurses are

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⁶ Turner testified that, in one instance, a floor supervisor recommended a "write-up" and that a disciplinary action notice followed, but the employee was given a verbal warning only. (Tr. 295, ERX 12.)

not rendered statutory supervisors based on their reporting of employee infractions that could warrant discipline, as charge nurses had "reportorial authority" only); *VIP Health Services, Inc. v. NLRB*, 164 F.3d 644, 648 (D.C. Cir. 1999) (finding that "mere reporting is insufficient to establish that the [putative supervisors] effectively recommend discharge or discipline" (citation omitted)); *Beverly Enters. v. NLRB*, 148 F.3d 1042, 1046 (8th Cir. 1998) (same); *NLRB v. Meenan Oil Co., L.P.*, 139 F.3d 311, 322 (2d Cir. 1998) ("The fact that these reports [of misconduct] may *result* in discipline is irrelevant; the [putative supervisor] is acting as a conduit for information and exercises no judgment in passing the knowledge along to management." (citation omitted)).

Rather than addressing these undeniably negative facts and contrary case law, the Company attempts to draw attention to other facts in the record, which indicate that the floor supervisors are aware of the possible disciplinary consequences of their incident reports. The Company states that, particularly where dealer cheating is detected, the floor supervisors "are aware when they decide to prepare a written Incident Report that it can and does lead to disciplinary action up to and including termination." (Br. 35.) The Company, however, fails to provide any legal support for the notion that the floor supervisor's state of mind, at the time of filing an incident report, has any legal relevance. Regardless, a factual report of misconduct is hardly transformed into a recommendation of discipline

simply because the filing party is aware that discipline "may" (Br. 18) follow from their reporting of the facts.

In view of the foregoing, the Company has not made even the most rudimentary of showings necessary to demonstrate that the floor supervisors make "effective recommendations" regarding discipline.

b. The floor supervisors do not exercise independent judgment in connection with the incident reports

As explained above, to be supervisors under the Act, the floor supervisors must not only perform one of the Section 2(11) functions, but must exercise "independent judgment" in doing so. Under the language of Section 2(11), "independent judgment" stands in contradistinction to judgment "of a merely routine or clerical nature." The Act thus "provides a baseline for the degree of discretion required to render the exercise of any of the enumerated functions of [Section] 2(11) supervisory." *Oakwood*, 348 NLRB No. 37, slip op. at 8. The Company claims (Br. 18-21) that the floor supervisors exercise such independent judgment in effectively recommending discipline. Although we have already shown that the Company's argument fails because the floor supervisors do not effectively recommend discipline, it also fails because they do not exercise independent judgment in completing the incident reports.

The Company essentially argues that the floor supervisors use independent judgment in preparing the incident reports because they receive training on how to exercise "sound judgment" (Br. 19), both in general and where dealer cheating activity is concerned. In addition, the Company points out (Br. 20) that the floor supervisors exercise discretion in determining whether a dealer's misconduct warrants the filing of an incident report.

Despite these claims, however, by the Company's own account, the floor supervisors' "disciplinary function" at the casino consists of "observing and reporting" dealer misconduct. (Br. 17, 21, 26.) That the Company's training materials implore floor supervisors to generally exercise "sound judgment" does not change the essential nature of what the floor supervisors do when they fill out incident reports – they make a factual report of misconduct that they observed.

To the extent that the record addresses the more specific training that floor supervisors receive on the prevention of cheating (Tr. 460-65, 504, 511-12, ERX 48), it does not indicate any discretionary role for the floor supervisors where cheating is concerned. To the contrary, although the floor supervisors are trained extensively in how to *recognize* cheating (Tr. 511-12), once cheating is recognized, the floor supervisor enjoys *no* discretion to make determinations and judgments about the next step to be taken; the floor supervisor is required to report what he saw (Tr. 465, 509). Accordingly, the special cheating-specific training to which

the Company refers (Br. 19) may be significant in helping floor supervisors cultivate the professional skill of detecting cheating; but it does not confer on them any greater discretion in determining whether to report it. In other words, even where the "grievous offense" (Br. 21) of dealer cheating occurs, the floor supervisors exercise no independent judgment in determining whether to report it.

The Company nonetheless maintains that the floor supervisors' "observing and reporting" function is not a mechanical one, devoid of any independent judgment, because "[f]loor [s]upervisors know when they observe and report cheating that it will result in serious disciplinary action including specifically termination of a dealer." (Br. 21.) The Company thereby suggests that the floor supervisors exercise discretion beyond the "routine or clerical" in filing their incident reports because they know the grave disciplinary consequences that follow if an employee is found to have cheated. As explained above, the Company failed to show that the floor supervisor's state of mind, when submitting an incident report, has any legal relevance.

The Company's only remaining claim that floor supervisors exercise independent judgment is based on the discretion that they purportedly enjoy in determining whether lesser infractions than cheating warrant an incident report.

(Br. 18, 20.) The minor nature of any such alleged discretion is apparent from the illustrative example discussed in the Company's brief. (Br. 20.) In that example,

drawn from the testimony of Table Games Administrator Turner (Tr. 397-98), a hypothetical floor supervisor exercises discretion in determining when a dealer's repeated tardiness in returning from break warrants an incident report. (Br. 20.) The discretion involved in making such a determination — whether to file an incident report, for example, after the second instance of minor misconduct, as opposed to the third — does not involve a sophisticated "discerning and comparing" of data, as required to show "independent judgment" under Section 2(11). *Oakwood*, 348 NLRB No. 37, slip op. at 8. Rather, it involves a routine sort of "judgment call" (Br. 20). More importantly, the Company presents no evidence that any *real*, as opposed to hypothetical, floor supervisor ever exercised such discretion.

c. The floor supervisors' incident reports do not lay the foundation for discipline

The Company also argues that the floor supervisors are Section 2(11) supervisors because the incident reports "initiate" the disciplinary process for the Company's dealers. (Br. 21, 35-36.) This argument is meritless.

As discussed above, the evidence fails to establish any correlation between the floor supervisors' incident reports and any discipline actually issued to the Company's dealers. In these circumstances, the Company's suggestion that the floor supervisors' incident reports initiate discipline is simply wrong.

Moreover, the cases that the Company cites to support its theory are distinguishable. (Br. 21, 36.) In each of those cases, an initial notice of employee misconduct was deemed to "lay the foundation" for discipline because the employer relied on the initial notice in determining what discipline to issue for subsequent instances of misconduct. See Oak Park Nursing Care Center, 351 NLRB No. 9, slip op. at 2-3 (2007) (evidence shows that counseling forms recording misconduct also "lay the foundation for future discipline"); Sheraton Universal Hotel, 350 NLRB No. 84, slip op. at 4-5 (2007) (evidence shows that coach-and-counsels for employee's misconduct are relied on in subsequent discipline); Promedica Health Systems, 343 NLRB 1351, 1351 (2004) (evidence shows that coachings for employee misconduct are "taken into consideration in determining whether further discipline is warranted, and the nature of that discipline, for future infractions"); Progressive Transportation Services, 340 NLRB 1044, 1046-47 (2003) (evidence shows that warning notices play a role in later discipline). In those circumstances, the Board found that later discipline built on the initial notice of misconduct, making the initial notice the first step in the employer's system of progressive discipline. Id.

Here, the Company has made no similar showing that the incident reports play a role in the Company's progressive disciplinary system. Specifically, the Company has failed to provide evidence that a floor supervisor's incident report

has any bearing on the discipline that may issue to a dealer for a later infraction. Therefore, the Board reasonably found (SA 20) that "the ramifications of completing the incident report is significantly different in this case" than in the cases relied on by the Company.

4. The Company failed to establish that the floor supervisors assign and responsibly direct dealers

The Company also argues that its floor supervisors have the authority to assign and responsibly direct dealers and, therefore, are supervisors under the Act. (Br. 33-35.) The Company specifically focuses on the casino's poker room, a gaming area in which the floor supervisor is the highest-ranking employee present. (Tr. 552.) As explained below, the Company has not carried its burden of proving that the floor supervisors exercise independent judgment in assigning or responsibly directing dealers, in the poker room or elsewhere.⁷

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⁷ To the extent that the Company (Br. 5-7) relies on the floor supervisors' job descriptions to show that floor supervisors have authority to assign and direct, that reliance is misplaced. It is well established that "job titles and descriptions prepared by employers are not controlling" and that the Board instead "looks to the authority actually possessed and the work actually performed by the alleged supervisor." *Oakwood*, 348 NLRB No. 37, slip op. at 5 n.24 (citing *Heritage Hall*, 333 NLRB 458, 458-59 (2001) ("It is well settled that employees cannot be transformed into supervisors merely by vesting them with the title or job description of supervisor.")); *Beverly Enters.-Mass., Inc. v. NLRB*, 165 F.3d 960, 963 (D.C. Cir. 1999) ("theoretical [or] paper power will not suffice to make an individual a supervisor" (internal quotations omitted)); *New York Med. Ctr. v.*

a. The floor supervisors do not assign dealers using independent judgment

In *Oakwood*, 348 NLRB No. 37, slip op. at 4-5, the Board explained that "assign" refers to "the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee." *Id.*, slip op. at 4. An individual who takes or effectively recommends any one of these three types of action, in the interest of the employer and using independent judgment, is a "supervisor" under Section 2(11). *Id.*, slip op. at 3-4.

As the Board found (SA 17), the Company has not shown that floor supervisors play any role in assigning dealers a schedule or time of work. Rather, the Table Games Scheduler/Trainer creates an overall schedule applying to all table games employees, including those in the poker room, and the shift and pit managers make more specific time assignments for dealers, consistent with the overall schedule. (SA 15, 17; Tr. 94, 126, 210-15, 252-54, 366, 705.)

The Company also failed to show that the floor supervisors assign dealers to overall tasks or to a place. Relying solely on the generalized testimony of its management officials (and, particularly, that of Director of Table Games Travis),

NLRB, 156 F.3d 405, 414 (2d Cir. 1998) (finding job description insufficient to establish supervisory authority).

the Company maintains that floor supervisors working in the poker room have broad authority to: assign dealers to tables within the poker room; move dealers between tables in the poker room; and seek reassignment of dealers, either to or away from the poker room, in consultation with the pit manager. (Br. 34-35.) However, it is well established that generalized and self-serving testimony of this kind cannot suffice to prove Section 2(11) supervisory authority. *See Res-Care*, *Inc.*, 705 F.2d at 1467 (evidence "limited very largely to the administrator's general assertions" not sufficient to establish supervisory authority); *Central Freight Lines, Inc. v. NLRB*, 653 F.2d 1023, 1025 (5th Cir. 1981) (conclusory testimony not sufficient to establish supervisory authority).

The persuasive value of the managers' general testimony is reduced further when compared to that of Gary Kaysinger, one of the Company's floor supervisors. As Kaysinger's much more detailed testimony explained, the floor supervisors in the poker room do not assign dealers to specific tables, but merely establish a rotation of tables that the dealers work through. (Tr. 767-70, 776-77.) Kaysinger also testified that this rotation is established purely on customer demand. (Tr. 775.) Based on this evidence, the Board reasonably found (SA 18) that the floor supervisors do not exercise independent judgment in establishing the order in which work is to be performed but, instead, "simply open tables in response to the number of customers demanding a particular type of game." Moreover, the floor

supervisors do not alter the rotation once established or otherwise modify the dealers' progress through the rotation. (Tr. 776.) In these circumstances, the Board properly found that "the floor supervisors' development of a string of open tables for the dealers to rotate among is not sufficient to vest them with supervisory status." (SA 18 (citations omitted).) *See Oakwood*, 348 NLRB No. 37, slip op. at 4 (observing that, once employee is assigned to a place, time, and overall tasks, "choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers)" does not qualify as "assignment"); *Croft Metals*, 348 NLRB No. 38, slip op at 6 (finding that lead person's reallocation of tasks among those on assembly line, in order to finish projects or achieve production goals, does not qualify as "assignment").

b. The floor supervisors do not responsibly direct dealers using independent judgment

In *Oakwood*, the Board also clarified the meaning of the statutory phrase "responsibly to direct." The Board explained that:

for direction to be 'responsible,' the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly.

Oakwood, 348 NLRB No. 37, slip op. at 7.

The Company here argues (Br. 34), again with specific reference to the floor supervisors who work in the poker room, that the floor supervisors responsibly direct the dealers working with them. Once again, the Board rejected the Company's argument, finding that it lacked any support in the record.

As the Board found (SA 19), nearly every aspect of the directions that the floor supervisors give to dealers is governed by the Company's "very detailed internal control manuals." These manuals set forth exactly how each game must be run and the floor supervisors have no discretion to vary from them. (SA 19; Tr. 155-56, 201, 417-18, UX 18-25.) Therefore, the floor supervisor's role is to make sure that the dealers comply with these detailed gaming protocols. As the floor supervisors thus provide direction of a formulaic kind to dealers, they do not exercise independent judgment and their directions cannot serve as the basis for a finding of supervisory status. See Res-Care, Inc., 705 F.2d at 1464 (finding that under Section 2(11), "[s]upervision in the elementary sense of directing another's work is excluded; a supervisor under the statute must have authority over another's job tenure and other conditions of employment"); Oakwood, 348 NLRB No. 37, slip op. at 8 (stating that "judgment is not independent if it is dictated or controlled by detailed instructions").

Moreover, even assuming that the floor supervisors exercised independent judgment in directing the dealers, the Company's argument still fails. As the

Board explained (SA 20), "the record is devoid of any evidence that the floor supervisors are held accountable for the performance of the dealers." In the absence of any such evidence, the Company cannot show responsible direction as defined in *Oakwood*.⁸

Finally, there is no merit to the Company's claim (Br. 33-34) that, because the floor supervisors are the highest-ranking employees in the poker room, they must necessarily "assign" and "responsibly direct" any dealer in that area. Contrary to the Company's suggestion, one is not presumed to be a supervisor under the Act merely because he outranks other employees in a given work space. Indeed, as this Court has aptly stated, the fact that particular individuals are the "highest-ranking employees on the premises . . . does not ipso facto make them supervisors." *Res-Care, Inc.*, 705 F.2d at 1467 ("A night watchman is not a supervisor just because he is the only person on the premises at night, and if there were several watchmen it would not follow that at least one was a supervisor."). Rather, to meet its burden of showing supervisory status, an employer must support its claims with *specific examples* based on record evidence. *Oil, Chemical*

⁸ In its brief (Br. 16, 18), the Company claims that floor supervisors "are held accountable and can be disciplined if they fail to report cheating[.]" The record, however, fails to support this claim as there is no evidence that a floor supervisor has ever been held accountable in this manner.

and Atomic Workers Int'l Union, 445 F.2d at 243 ("the statute requires . . . evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority"). The Company has produced no such specific evidence to support its supervisory-status claims here.

C. The Company's Remaining Arguments Lack Merit

1. The Company's IGC and policy-related arguments are unpersuasive

The Company repeatedly suggests (Br. 5-6, 12-13, 17, 29, 30-31 & n.4, 32-33) that, because the floor supervisors are considered supervisors for the purposes of certain state gaming regulations (Tr. 429), they must be supervisors under the Act. The Company also maintains that, because it requires the "undivided loyalty" (Br. 28-33) of its floor supervisors to effectively combat illicit activities in its casino and to ensure compliance with the litany of gaming regulations to which the casino is subject, the floor supervisors must be supervisors under the Act. Neither of those arguments has merit.

That the floor supervisors are considered "supervisors" under IGC regulations is of no moment. Section 2(11) of the Act, not the IGC (a state authority whose concern is gaming regulation, not labor-management relations), determines which workers are statutory supervisors. Plainly, the "criteria for

'supervisor' established by a State do not necessarily satisfy the criteria of Section 2(11)." *Howard Johnson Co.*, 174 NLRB 1217, 1222 (1969).

There is equally no merit to the Company's claims (Br. 29-30, 32-33) that if the floor supervisors at issue were included in a bargaining unit with the casino's dealers, the loyalties of the floor supervisors would be divided and the "balance of power" between management and non-management personnel compromised. The Company, presumably, uses the terms "balance of power" and "undivided loyalty" to invoke policy concerns that this Court has articulated in applying Section 2(11). Those concerns, however, are not implicated in this case.

As this Court has explained, supervisors are excluded from the protections of the Act to ensure: on the one hand, that those who "control[] hiring, discipline, assignments, and other dimensions of the employment relationship" are not in a bargaining unit with employees and thereby "subject to control by the same union as the employees they [are] supposed to be controlling on the employer's behalf'; and, on the other hand, that those who "have authority to control the conditions of employment in the interest of the employer'" do not suffer "a bad case of divided loyalties" by virtue of their participation in a bargaining unit with the employees whose terms and conditions of employment they control. *Res-Care, Inc.*, 705 F.2d at 1465-1466. *Accord GranCare, Inc.*, 170 F.3d at 665. As explained at length above, however, the Company has failed to show that the floor supervisors in this

case have any control or authority over the dealers' terms and conditions of employment. As a result, they are not "supervisors in the special sense" meant by Section 2(11), and by this Court in its articulation of the policies behind Section 2(11). *Res-Care*, *Inc.*, 705 F.2d at 1466. Accordingly, the Court's policy observations about the "balance of power" and "divided loyalties" should be of no concern here. *Id.* at 1465-66.

2. The secondary indicia of supervisory status relied upon by the Company fail to support a finding of supervisory status

The Company relies on so-called "secondary indicia" of supervisory status

— "indicia not included in the statutory definition of supervisor but that often
accompany the status of supervisor" — to advance its arguments regarding its floor
supervisors. *Public Service Co. of Colorado v. NLRB*, 405 F.3d 1071, 1080 (10th
Cir. 2005). Thus, the Company notes that the floor supervisors are required to
wear business attire (Br. 9, 25) and are compensated differently than dealers (Br.
7). It also asserts that they view themselves as supervisors (Br. 6-8) and that they
receive training that dealers do not receive (Br. 11, 19). It is well settled, however,
that such secondary indicia cannot substitute for a showing that an individual uses
independent judgment in exercising one of the primary indicia of supervisory
authority listed in Section 2(11). *See E & L Transport Co. v. NLRB*, 85 F.3d 1258,
1270 (7th Cir. 1996) (observing that secondary indicia are "not determinative on

their own"). As shown above, the Company utterly failed to meet its burden of proving that the floor supervisors possess any of the primary indicia of supervisory status. Accordingly, the secondary indicia are of no import here.

CONCLUSION

The Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

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UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

No. 08-2037

Petitioner

* Board Case No.

and * 25-CA-30558

*

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW

*

Intervenor

*

V.

*

AZTAR INDIANA GAMING COMPANY, LLC d/b/a CASINO AZTAR

*

Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by first-class mail the required number of copies of the Board's brief in the above-captioned case, and has served two copies of the brief by first-class mail upon the following counsel at the addresses listed below:

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s/Linda Dreeben_

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Dated at Washington, DC this 3rd day of September, 2008

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

v.

AZTAR INDIANA GAMING COMPANY, LLC * d/b/a CASINO AZTAR *

*

Respondent *

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 9,365 words in proportionally spaced, 14-point Times New Roman type, and that the word processing system used was Microsoft Word 2003. The Board further certifies, pursuant to Circuit Rule 31(e), that the PDF copy of its brief submitted to the Court as an e-mail attachment to briefs@ca7.uscourts.gov was scanned for viruses using Symantec Antivirus Corporate Edition, program version 10.0.2.2000 (9/1/2008 rev. 3), and found free of viruses.

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